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## A Fresh Start for the Charter Fundamental Questions on the Application of the European Charter of Fundamental Rights

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# A FRESH START FOR THE CHARTER: FUNDAMENTAL QUESTIONS ON THE APPLICATION OF THE EUROPEAN CHARTER OF FUNDAMENTAL RIGHTS

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## INTRODUCTION

Without a doubt, the entry into force of the Charter of Fundamental Rights of the European Union (“Charter”) is a major legal innovation of the Lisbon Treaty and will have a significant impact on the constitutionalization of the European Union legal order in the long run. Some observers comment that the way in which the European Court of Justice (“ECJ” or “Court”) will conduct its jurisprudence vis-à-vis the Charter might ultimately answer the question of the Union’s *finalité* in the daily practice of the European Court. In that sense, the far-reaching standardization in the substantive law of federal entities resulting from the jurisprudence of constitutional courts in the respective federal states was cited as a negative example in the Convention on the Charter.<sup>1</sup> For others, the Charter will give the Court the necessary impetus to become a fully developed constitutional court.<sup>2</sup> In any event, the jurisprudence of the Court on the Charter will be closely followed by the constitutional courts of the Member States and the political institutions of the European Union, which are both rather reluctant to see a far-reaching constitutionalization of the European legal order, even if for quite different reasons.<sup>3</sup> The

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1. In particular, the experiences of Canada, the Federal Republic of Germany, and the United States were cited. See William Joseph Wagner, *The Role of Basic Values in the Contemporary Constitutional Hermeneutics of Germany and the United States*, 56 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 178, 189 (1996); Ludwig Weber, *Grundrechtsschutz in Kanada—Ungeschriebene Grundrechte und die kanadische Bill of Rights*, 40 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 727, 746 (1980).

2. See Thomas von Danwitz, *Grundfragen einer Verfassungsbindung der Europäischen Union*, 58 JURISTEN ZEITUNG 1125, 1125–27 (2003).

3. While the constitutional courts of the Member States fear that their autonomy and their competency could be evaded, the institutions are hesitant to see their ability to legislate more strongly restricted by the Charter of Fundamental Rights of the European Union (“Charter”) than on the basis of the jurisprudence of the ECJ.

European Court of Human Rights (“ECtHR”) will be a collaborator and have a profound interest in this endeavor. In the meantime, the relationship between the ECJ and the ECtHR might become even more complex as a result of the European Union’s accession to the European Convention on Human Rights (“ECHR”).

Given the importance of the substantive issues at stake and the institutional stakeholders involved in the evolution of the Charter rights, it appears quite natural to follow the jurisprudence of the Court very closely. Even though the Charter came into force only two years ago, the Court has already delivered quite a significant number of judgments<sup>4</sup> in a great variety of fields of substantive law, particularly in matters of social policy, free movement of persons, the status of refugees, and EU citizenship.<sup>5</sup> In particular, the Court is faced with all the major questions involved in the practical application of the Charter via horizontal effect. In order to improve the understanding of the ongoing process it might be helpful to give an overview of the essential questions with which the national courts and the ECJ are faced.

### I. TO START OFF: THE QUESTION OF APPLICABILITY

Certainly, the application of the Charter requires its applicability *ratione temporis* and *ratione materiae*. Even though the Court has dealt extensively with the question of applicability of the Charter in only a small number of judgments, it is obvious that these questions have to be answered implicitly in the affirmative before the Court may move onto an interpretation of the Charter rights. The Court has not yet ruled explicitly on the applicability *ratione temporis*, which is not subject to a specific

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4. Between December 1, 2009 and November 1, 2011, the Court delivered fifty-three decisions in which the Charter was cited.

5. See, e.g., *Runčič-Vardyn v. Vilniaus Miesto Savivaldybės Administracija*, Case C-391/09, [2011] E.C.R. I\_\_\_\_ (delivered May 12, 2011) (not yet reported); *McCarthy v. Sec’y of State for the Home Dep’t*, Case C-434/09, [2011] E.C.R. I\_\_\_\_ (delivered May 5, 2011) (not yet reported); *Sayn-Wittgenstein v. von Wien*, Case C-208/09, [2010] E.C.R. I\_\_\_\_ (delivered Dec. 22, 2010) (not yet reported); *Land Baden-Württemberg v. Tsakouridis*, Case C-145/09, [2010] E.C.R. I\_\_\_\_ (delivered Nov. 23, 2010) (not yet reported); *Bundesrepublik Deutschland v. B & D*, Joined Cases C-57/09 & C-101/09, [2010] E.C.R. I\_\_\_\_ (delivered Nov. 9, 2009) (not yet reported); *Chatzi v. Ikononikon*, Case C-149/10, [2010] E.C.R. I-8489.

provision of the Charter. Nonetheless, the Court has examined the validity of legislative acts that entered into force before December 1, 2009, and that are still in effect after that date, in light of the Charter, thereby implicitly assuming the applicability of the Charter to such acts. This rationale also should apply to administrative acts that have permanent effect, even if they have been issued before that date. To the contrary, in principle, the applicability of the Charter should be denied in situations that have become definitive in law before the Charter's entry into force.

The applicability of the Charter *ratione materiae* is governed by Article 51 of the Charter.<sup>6</sup> According to Paragraph 1 of this Article, the Charter applies, on one hand, to the institutions, bodies, offices and agencies of the European Union and, on the other hand, to the Member States only when they are implementing EU law. While the European Union and its institutions are clearly bound by the Charter, the extent of the Charter's applicability with respect to the Member States is much less evident.

## II. APPLICABILITY OF THE CHARTER TO MEMBER STATES

In order to understand the scope of application of the Charter with regard to Member States it is essential to consider the teleology and the wording of Article 51 of the Charter as well as the related explanations, and especially the genesis of this Article.<sup>7</sup> These elements show that the Charter applies to Member States only when they are "implementing Union law"<sup>8</sup>

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6. See Charter of Fundamental Rights of the European Union art. 51, 2010 O.J. C 83/389, at 402 [hereinafter Charter of Rights].

7. *Id.* art. 51; see GUY BRAIBANT, LA CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE: TÉMOIGNAGE ET COMMENTAIRES 251–53 (2001) (providing the teleology of Article 51 from the perspective of the vice-president of the Convention and member of the group of five who drafted the Charter); Clemens Ladenburger, *Artikel 51 GRCh (Art.II–II VVE) Anwendungsbereich*, in KÖLNER GEMEINSCHAFTSKOMMENTAR ZUR EUROPÄISCHEN GRUNDRECHTE-CHARTA 759, 764–65, ¶¶ 20–23 (Peter J. Tettinger & Klaus Stern eds., 2006) (explaining the wording and teleology of Article 51 from the perspective of a member of the legal service of the European Commission, a member who was on a secondment at the secretariat of the drafting convention).

8. For different views on the significance of this expression, see especially Part II.C–D.

and does not apply to national legislation that is within the sole competence of the Member States.<sup>9</sup>

*A. Teleology of Article 51 of the Charter*

From a teleological point of view, the underlying purpose of the Charter is to include within a single, easily understandable document a catalogue of fundamental rights that limits the authority of the European Union, its bodies and institutions, and the exercise of their authority in the same way in which, at the national level, the authority of Member States is bound by the fundamental rights included in their respective constitutions. Therefore, the function of the Charter is to ensure, in the first place, that the European Union, its bodies and its institutions, are constitutionally bound by a catalogue of fundamental rights, which will be applied and enforced by the Court. This catalogue of fundamental rights equally applies to Member States. But it has to be kept in mind that there are three different systems of protection of fundamental rights that apply to Member States—their own national system of fundamental rights,<sup>10</sup> the ECHR, and the Charter. The Charter, however, only applies to Member States when they are implementing EU law. To the contrary, when the act in question is a state act within the competence of the Member States, they are bound by their own system of fundamental rights as well as by the ECHR.

This plurality of systems of protection of fundamental rights highlights the need for a clear-cut delimitation of the respective fields of application of these systems in order to preempt eventual conflicts between them and the institutions that carry them out—that is to say, the national constitutional courts and the ECtHR on one hand, and the ECJ on the other. In this regard, one must note that the function of the Charter is not to enable harmonization of the systems of protection of fundamental rights of Member States. In other words, the

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9. See Florence Benoît-Rohmer, *La Charte des droits fondamentaux de l'Union européenne*, 19 RECUEIL LE DALLOZ 1483, 1490 (2001); Jean-Paul Jacqué, *La démarche initiée par le Conseil européen de Cologne*, 12 REVUE UNIVERSELLE DES DROITS DE L'HOMME 3, 6 (2000).

10. For federally structured Member States, such as Germany, there might even be a second internal level of fundamental rights protection.

Charter does not establish a minimum standard generally applicable to Member States like the ECHR does. The Charter has not been elaborated by the necessity to create such a standard, but rather by a genuine demand for a uniform application of EU law. For the Union, it is clear that EU law cannot be interpreted and applied in conformity with, and according to, different requirements under national standards of protection of fundamental rights. This is all the more true for questions dealing with the validity of EU law. To do otherwise would create the risk of having twenty-seven different standards of protection of fundamental rights within the European Union, and therefore a heterogeneous application of the EU law.

As important as the respect for a uniform application of EU law in Member States is, it appears evident from the point of view of the Court that the obligation of Member States to respect the provisions of the Charter necessitate that a national measure implements EU law. Therefore, the Charter is not intended to overlap with national constitutional provisions<sup>11</sup> or duplicate the general system of protection of fundamental rights found in the ECHR.<sup>12</sup>

### B. *The Meaning of Article 51 of the Charter*

As regards the wording of Article 51 of the Charter, on one hand, the use of the term “only”<sup>13</sup> in relation to Member States is unequivocally clear. On the other hand, the use of such a categorical term is unusual within EU law. Moreover, the wording of Article 51 is further clarified by the reference in Paragraph 1 to the limitations of competence that the Charter only applies “with due regard for the principle of subsidiarity,” “in accordance with their respective powers,” and “respecting the limits of the powers of the Union as conferred on it in the

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11. See Benoît-Rohmer, *supra* note 9, at 1490; Jean-Paul Jacqué, *La charte des droits fondamentaux de l'Union européenne: Aspects juridiques généraux*, 14 REVUE EUROPÉENNE DE DROIT PUBLIC 107, 110 (2002); see also Commission Communication to Member States on the Legal Nature of the Charter of Fundamental Rights of the European Union, COM (2000) 644 Final, at 5, ¶ 9 (Oct. 2000).

12. See Ladenburger, *supra* note 7, at 765, ¶ 24.

13. The French version “uniquement” and the German version “ausschliesslich” are even stronger.

Treaties.”<sup>14</sup> Similarly, in Paragraph 2, there are references to the neutrality of the Charter concerning the division of competencies between the European Union and Member States. According to this paragraph, the Charter, firstly, does not “extend the field of application of Union law beyond the powers of the Union,” secondly, does not “establish any new power or task for the Union,” and thirdly, does not “modify powers and tasks as defined in the Treaties.”<sup>15</sup>

In the explanations related to the first sentence of Article 51(1), which refer to the decisions of the Court in *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft, Elliniki Radiophonia Tiléorassi AE (ERT AE) v. Dimotiki Étairia Pliroforissis (DEP) (“ERT”)*, and *Annibaldi v. Sindaco del Comune di Guidonia*,<sup>16</sup> it is stated that the scope of application of the Charter follows “unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law” as confirmed by the decision in *Karlsson*.<sup>17</sup>

### C. The Genesis of Article 51 of the Charter

During the drafting of the Charter, several different proposals pertaining to the application of the Charter to Member States were put forward and discussed.<sup>18</sup> The proposals provided, in chronological order, that the provisions of the Charter be “binding on the Member States only where the latter

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14. Charter of Rights, *supra* note 6, art. 51(1), 2010 O.J. C 83, at 402; see Sacha Prechal, *Competence Creep and General Principles of Law*, 3 REV. EUR. ADMIN. L. 5, 20 (2010).

15. Charter of Rights, *supra* note 6, art. 51(2), 2010 O.J. C 83, at 402.

16. See *Annibaldi v. Sindaco del Comune di Guidonia*, Case C-309/96, [1997] E.C.R. I-7493; *Elliniki Radiophonia Tiléorassi AE (ERT AE) v. Dimotiki Étairia Pliroforissis (DEP)*, Case C-260/89, [1991] E.C.R. I-2925; *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, Case C-5/88, [1989] E.C.R. I-2609.

17. Explanations Relating to the Charter of Fundamental Rights, 2007 O.J. C 303/17, at 32 [hereinafter Charter Explanations]; see *Karlsson & Others*, Case C-292/97, [2000] E.C.R. I-2737, ¶ 37.

18. See BRAIBANT, *supra* note 7, at 251; Martin Borowsky, *Artikel 51 (Art. II-III EurVerf)*, in CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION 531, 534 (Jürgen Meyer ed., 2d ed. 2006); Ladenburger, *supra* note 7, at 764, ¶ 20.



transpose or apply the law of the Union,”<sup>19</sup> “applicable...to Member States when implementing Community law,”<sup>20</sup> “addressed...to the Member States exclusively within the framework of implementing Community law,”<sup>21</sup> or “addressed...to the Member States exclusively within the scope of Union law.”<sup>22</sup> This last proposal was strongly criticized by certain members of the Convention for being vague and too broad.<sup>23</sup> Consequently, the Convention went back to the use of “implementation,”<sup>24</sup> which was perceived as being more restrictive<sup>25</sup> and able to limit the scope of application of the Charter and better affirm the principle of subsidiarity.<sup>26</sup> Certain members of the Convention expressed their concern that the scope of application of the Charter could be considered too broad;<sup>27</sup> therefore, the reference to the *Annibaldi* decision of the Court was included in the explanations.<sup>28</sup> Thus, the mere fact that a national measure falls within a field in which the European Union has powers may not lead to the applicability of the Charter.<sup>29</sup>

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19. See Draft Charter of Fundamental Rights of the European Union, Charte 4123/1/00 Rev.1, Convent 5, at 9 (Feb. 15, 2000). This proposition was accompanied by the following commentary: “It is intended to indicate clearly that the Charter’s scope is restricted to the European Union and to avoid any application to the Member States when they are acting within their own jurisdiction.” *Id.*

20. See Draft Charter of Fundamental Rights of the European Union, Charte 4149/00, Convent 13, at 2 (Mar. 8, 2000).

21. See Draft Charter of Fundamental Rights of the European Union, Charte 4235/00, Convent 27, at 1 (Apr. 18, 2000).

22. See Draft Charter of Fundamental Rights of the European Union, Charte 4316/00, Convent 34, at 9 (May 16, 2000).

23. See BRAIBANT, *supra* note 7, at 251; Borowsky, *supra* note 18, at 534; Ladenburger, *supra* note 7, at 764.

24. See the Draft Charter of Fundamental Rights of the European Union, Charte 4373/00, Convent 40, at 5 (June 23, 2000) and the Draft Charter of Fundamental Rights of the European Union, Charte 4422/00, Convent 45, at 15 (July 28, 2000) where the final version was proposed.

25. See BRAIBANT, *supra* note 7, at 251; Borowsky, *supra* note 18, at 534; *see also* Ladenburger, *supra* note 7, at 764.

26. See Guy Braibant, *La Charte des droits fondamentaux*, 2001 DROIT SOCIAL 73.

27. The discussions concerning the scope of application of the Charter also included proposals that the reference to Member States should be completely removed. *See* Borowsky, *supra* note 18, at 533.

28. See Charter Explanations, *supra* note 17, at 32; *see also* Ladenburger, *supra* note 7, at 764 n.39.

29. See *Annibaldi v. Sindaco del Comune di Guidonia*, Case C-309/96, [1997] E.C.R. I-7493, ¶¶ 13–24; Ladenburger, *supra* note 7, at 766, ¶ 29.

In this context, it also must be noted that at the time of a hearing, in front of the second working group of the Convention, the Director-General of the European Commission's Legal Service rejected as unfounded the concern that the Charter would have too broad of a scope with regard to national legislative and administrative measures, due to the final wording of the Charter.<sup>30</sup> According to the European Commission ("Commission"), fundamental rights are applicable to national measures only in two situations put forth in the decisions of *Wachauf*,<sup>31</sup> where they apply or implement EU law, and *ERT*,<sup>32</sup> where the Member State may restrict a fundamental freedom on grounds of public order, public security, or public health. According to the Commission, even if the Court admittedly used a rather general formula to designate the situations where Member States must respect fundamental rights "within the scope of Community law," in practice it limited the application of fundamental rights only to two situations mentioned above as confirmed by the *Annibaldi* decision. In its analysis of the applicability of the Charter, the Court would require the existence of a national measure specifically transposing or implementing EU law and would not consider it sufficient that a Member State simply acted within the scope of EU law. As a result, in practice, fundamental rights would only apply to a limited number of national legislative or administrative measures, as confirmed by the use of the expression "when they are implementing Union law." The Commission considers this expression more comprehensible and less susceptible to a broad interpretation.<sup>33</sup>

#### *D. Relevance of the Existing Case Law*

If this aforementioned position of the Commission clearly and assuredly illustrates the scope of application of this

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30. See European Convention Working Group II, Brussels, Belg., Sept. 5, 2002, *Incorporation of the Charter/Accession to the ECHR*, at 41 (2002), available at <http://european-convention.eu.int/docs/wd2/1821.pdf>.

31. See *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, Case C-5/88, [1989] E.C.R. I-2609, ¶ 19.

32. See *Elliniki Radiophonia Tiléorasi AE (ERT) v. Dimotiki Étairia Pliroforissis (DEP)*, Case C-260/89, [1991] E.C.R. I-2925, ¶ 24.

33. See European Convention Working Group II, *supra* note 30, at 39–41.

provision, as demonstrated by the conclusions and commentaries on the issue, the question arises as to whether, according to the intention of the authors of the Charter, the application of this provision is limited to the situation put forward by *Wachauf*, and therefore whether the Charter only applies to Member States when they implement Union law in the strict sense of the term, meaning when they transpose a directive or implement a regulation.<sup>34</sup> Furthermore, it is debated whether the application of Article 51 of the Charter only covers the situations put forward in *Wachauf* and *ERT*,<sup>35</sup> or finally whether it extends beyond the scope of the situations envisioned in those lines of case law and applies in addition to the scope of application of general principles of Union law found in the Court's case law, which is considerably broader in scope.<sup>36</sup>

So far, the decisions of the Court regarding Article 51(1) of the Charter do not specifically relate to these questions and thus do not provide a definitive conclusion regarding this matter.<sup>37</sup> It

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34. Therefore, it is supported that the jurisprudence in *Elliniki Radiophonia Tiléorasi AE (ERT) v. Dimotiki Étairia Pliroforissis (DEP)* ("ERT") should be considered as "abandoned" and not applicable vis-à-vis the Charter. See Borowsky, *supra* note 18, at 541. According to others, if the members of the Convention chose a wording that was more restrictive, it is not clear that their intention was to return to the jurisprudence in *ERT*. See Jacqué, *supra* note 11, at 111.

35. See, e.g., Opinion of Advocate General Stix-Hackl, *Omega Spielhallen und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, Case C-36/02, [2004] E.C.R. I-9611, ¶ 55 n.29; EU NETWORK OF INDEP. EXPERTS ON FUNDAMENTAL RIGHTS, COMMENTARY OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION 393 (2006); HANS-WERNER RENGELING & PETER SZCZEKALLA, EUROPEAN LEGAL STUDIES INST., GRUNDRECHTE IN DER EUROPÄISCHEN UNION ¶ 295 (2004); Gilles de Kerchove & Clemens Ladenburger, *Le Point de Vue D'Acteurs de la Convention*, in LA CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE, SON APPORT À LA PROTECTION DES DROITS DE L'HOMME EN EUROPE 213, 215–16 (Jean Yves Carlier & Olivier de Schutter eds., 2002); Ladenburger, *supra* note 7, at 765, ¶ 23.

36. See Opinion of Advocate General Bot, *Scattolon v. Ministero dell'Istruzione, dell'Università e della Ricerca*, Case C-108/10, [2011] E.C.R. I\_\_\_\_, ¶ 118 (delivered Apr. 5, 2011) (not yet reported); TAKIS TRIDIMAS, THE GENERAL PRINCIPLES OF EU LAW 363 (2d ed. 2006); Koen Lenaerts & José A. Gutiérrez-Fons, *The Constitutional Allocation of Powers and General Principles of EU Law*, 47 COMMON MKT. L. REV. 1629, 1657–60 (2010).

37. See *Dereci v. Bundesministerium*, Case C-256/11, [2011] E.C.R. I\_\_\_\_, ¶¶ 71–72 (delivered Nov. 15, 2011) (not yet reported); *Gucye & Salmerón Sánchez*, Joined Cases C-483/09 & C-1/10, [2011] E.C.R. I\_\_\_\_, ¶ 69 (delivered Sept. 15, 2011) (not yet reported); *Rossius v. État Belge*, Joined Cases C-267–268/10, [2011] E.C.R. I\_\_\_\_, ¶¶ 16–20 (delivered May 23, 2011) (not yet reported); *Chartry v. Belgian State*, Case C-457/09, [2011] E.C.R. I\_\_\_\_, ¶¶ 22–26 (delivered Mar. 1, 2011) (not yet reported); *DEB Deutsche Energiehandels- und Beratungsgesellschaft v. Bundesrepublik*

should be noted, however, that the Court stated recently, referring to the wording of Article 51 of the Charter, that the Charter should be taken into consideration only for the purpose of interpreting the regulation in question.<sup>38</sup> Furthermore, the Court also held that the Charter was not applicable to a question raised by the relevant case that did not fall within the scope of the applicable secondary EU law.<sup>39</sup>

The applicability of the Charter *ratione materiae* is particularly important given the fact that the explanations to the Charter use the expression of Member States acting “in the scope of Union law” to explain the field of application of the Charter, while the Convention rejected the same expression and replaced it with the term “when they are implementing” for the wording Article 51(1). In addition, the Court uses these terms for different purposes in different situations. The use of the terms “implementing Union law” and “acting within the scope of Union law” does not simply bring up an argument on terminology, but actually raises questions about the significance of these terms when used in a particular context.<sup>40</sup>

It follows from what has been discussed above that the Charter applies to Member States when they are implementing EU law, in other words, when they are acting as a part of the decentralized administration of the Union and applying or implementing a regulation, transposing a directive, or executing a decision of the Union or a judgment of the Court (*Wachauf*). Additionally, the Charter applies to Member States when they restrict a fundamental freedom (*ERT*).<sup>41</sup> These elements do not

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Deutschland, Case C-279/09, [2010] E.C.R. I\_\_\_\_, ¶¶ 30–31 (delivered Dec. 22, 2010) (not yet reported); *Estov v. Ministerski savet na Republika Bulgaria*, Case C-339/10, [2010] E.C.R. I\_\_\_\_, ¶¶ 12–14 (delivered Nov. 12, 2010) (not yet reported); *Vino Cosimo Damiano v. Poste Italiane SpA*, Case C-20/10, [2010] E.C.R. I\_\_\_\_, ¶ 52 (delivered Nov. 11, 2010) (not yet reported); *J.McB. v. L.E.*, Case C-400/10, [2010] E.C.R. I\_\_\_\_, ¶¶ 51–52 (delivered Oct. 5, 2010) (not yet reported); *Rodríguez Mayor v. Herencia Yacente de Rafael de las Heras Dávila*, Case C-323/08, [2009] E.C.R. I-11621, ¶¶ 58–59.

38. See *J.McB.*, [2010] E.C.R. I\_\_\_\_, ¶¶ 51–52.

39. See *Gueye*, [2011] E.C.R. I\_\_\_\_, ¶ 69.

40. See Thomas von Danwitz, *Grundrechtsschutz im Anwendungsbereich des Gemeinschaftsrechts nach der Charta der Grundrechte*, in MATTHIAS HERDEGEN ET AL., STAATSRRECHT UND POLITIK: FESTSCHRIFT FÜR ROMAN HERZOG ZUM 75. GEBURTSTAG 19, 24–29 (2009).

41. The application of this jurisprudence is justified by the fact that when a Member State restricts a fundamental freedom, it applies, in principle, EU law, and an

allow for the conclusion that the Convention intended to limit the scope of application of the Charter to the situation envisioned in *Wachauf* and abandon the one put forward by *ERT*.<sup>42</sup> Beyond these two cases, the explanations support the conclusion that the Charter does not apply to Member States when they act within the scope of the powers of the European Union without there being a specific link between the national measure in question and EU law (*Annibaldi*).<sup>43</sup>

In that context, the question has been raised as to whether this understanding of Article 51 of the Charter and the explanations established by the presidency of the Convention are fully compatible with the existing case law of the Court. In particular, the judgments *Carpenter v. Secretary of State*<sup>44</sup> and *K.B. v. National Health Service Pensions Agency*<sup>45</sup> have been mentioned in this context. Nonetheless, a closer look at these judgments reveals that the Court used a perfectly orthodox approach in both. In conformity with *ERT*, the application of Article 8 of the ECHR in *Carpenter*, was triggered by the freedom to provide services. On the other hand, the application of Article 12 of the ECHR in *K.B.* resulted from the applicability of Article 141 of the Treaty Establishing the European Community (“EC Treaty”), and, thereby, followed the national implementation approach in *Wachauf*. If these judgments have been criticized, it has been for the extensive interpretation of the directly applicable substantive EU law provision, but not for a departure from the constructive approach under *Wachauf* and *ERT*. In consequence, these judgments do not pose a problem in terms of the interpretation of Article 51 of the Charter, but in terms of the substantive EU law. In that later respect, the recent case law seems to follow a more cautious approach.<sup>46</sup>

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examination of the respect for the principle of proportionality is difficult to accomplish without taking into consideration fundamental rights, especially when balancing interests of the parties.

42. See de Kerchove & Ladenburger, *supra* note 35, at 215.

43. See Ladenburger, *supra* note 7, at 765–66, ¶¶ 25–28.

44. Case C-60/00, [2002] ECR I-6305.

45. Case C-117/01, [2004] ECR I-568.

46. See *J.McB. v. L.E.*, Case C-400/10, [2010] E.C.R. I\_\_\_\_ (delivered Oct. 5, 2010) (not yet reported); see also *Gucyc & Salmerón Sánchez*, Joined Cases C-483/09 & C-1/10, [2011] E.C.R. I\_\_\_\_ (delivered Sept. 15, 2011) (not yet reported).

It also seems clear from the discussions during the Convention that the jurisprudence of the Court on nondiscrimination on grounds of nationality,<sup>47</sup> which also uses the term “within the scope of application of Union law” to determine the applicability of Article 18 of the Treaty on the Functioning of the European Union (“TFEU”), cannot be invoked to determine the applicability of the Charter.<sup>48</sup> The use of this term in the jurisprudence on nondiscrimination on grounds of nationality is explained by the specific situation envisioned by Article 18 of the TFEU and thus cannot be transposed upon the question at hand.<sup>49</sup> Furthermore, this jurisprudence was not taken into account in the drafting of the Charter and was not mentioned in the explanations. Moreover, an application of the jurisprudence on nondiscrimination on grounds of nationality would considerably broaden the scope of application of the Charter. This broadening would in particular contradict the concerns voiced at the drafting of Article 51 with respect to limiting the scope of the Charter’s application to Member States and would go beyond the situations put forward by *Wachauf* and *ERT*.<sup>50</sup>

### E. Consequences

Nonetheless, in practice, a prudent approach to the scope of application of the Charter should not lead one to think that only a small number of cases will fall under the Charter. As it results from the reference to *Wachauf* and *ERT* by the authors of the Charter, all cases that involve national measures determined

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47. See, e.g., *Trojani v. Centre Public d’Aide Sociale de Bruxelles (CPAS)*, Case C-456/02, [2004] ECR I-7573; *Martínez Sala v. Bayern*, C-85/96, [1998] ECR I-2691; *Collins v. Intrat Handelsgesellschaft & Kraul v. EML Electrola GmbH*, Joined Cases C-92/92 & C-326/92, [1993] ECR I-5145.

48. Consolidated Version of the Treaty on the Functioning of the European Union art. 18, 2010 O.J. C 83/01, at 56; see de Kerchove & Ladenburger, *supra* note 35, at 216; Pict Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question*, 39 COMMON MKT. L. REV. 945, 969 (2002); Francis G. Jacobs, *Human Rights in the European Union: The Role of the Court of Justice*, 26 EUR. L. REV. 331, 337 (2001); Ladenburger, *supra* note 7, at 766, ¶ 29.

49. See Ladenburger, *supra* note 7, at 766, ¶ 29.

50. See Eeckhout, *supra* note 48, at 969; Jacobs, *supra* note 48, at 336–41.

by obligations under Union law will fall within the Charter's scope.<sup>51</sup>

There are many examples of the application of the Charter in such a way,<sup>52</sup> one being that the Charter will apply to all national administrative measures that specifically implement EU law. In this context, measures that simply concern an area covered by a regulation of the European Union without being specifically controlled by that regulation do not fall within the scope of the Charter.<sup>53</sup> Moreover, the Charter does not apply to national legislation even though it is enacted in the context of the transposition of an EU directive in so far as it transcends what is regulated by the directive.<sup>54</sup> As for national judicial rules, the Charter applies to the judicial protection of a right that an individual invokes under EU law.<sup>55</sup> It is the same when national authorities or courts apply national procedural rules in accordance with the principle of procedural autonomy of Member States and in the absence of a specific EU regulation.<sup>56</sup> The mere fact that a procedural rule of the EU is pertinent in the context of a legal proceeding cannot entail the general applicability of the Charter to the resolution of that particular dispute.<sup>57</sup> With regard to rules of competition, the measures that the European Union takes based on Articles 101, 102, and 106 to 108 of the TFEU are subject to the Charter, whereas that, in principle, is not the case with Member State interventions that give rise to control by the European Union in accordance with these articles.

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51. See *Melki & Abdeli*, Joined Cases C-188–189/10, [2010] E.C.R. I-5667, ¶ 56.

52. See, e.g., *Ladenburger*, *supra* note 7, at 768–71, ¶¶ 35–50.

53. See *Criminal Proceedings Against Jean-Louis Maurin*, Case C-144/95, [1996] E.C.R. I-2914, ¶ 12; see also *Gueye & Salmerón Sánchez*, Joined Cases C-483/09 & 1/10, [2011] E.C.R. I\_\_\_\_, ¶ 69 (delivered May 12, 2011) (not yet reported).

54. See *Ladenburger*, *supra* note 7, at 766, ¶ 29.

55. See *id.* at 768.

56. See *Allassini v. Telecom Italia SpA*, Joined Cases 317–20/08, [2010] E.C.R. I-2213, ¶ 61; see also *Sacha Prechal & Rob Widdershoven, Effectiveness or Effective Judicial Protection: A Poorly Articulated Relationship*, in *TODAY'S MULTILAYERED LEGAL ORDER: CURRENT ISSUES AND PERSPECTIVES* 283, 293 (Tristan Baumé et al. eds., 2011).

57. See *J.McB. v. L.E.*, Case C-400/10, [2010] E.C.R. I\_\_\_\_, ¶¶ 51–52 (delivered Oct. 5, 2010) (not yet reported).

III. *THE DISTINCTION BETWEEN RIGHTS AND PRINCIPLES*

The preamble and the second sentence of Article 51(1) of the Charter explicitly introduce the distinction between “rights” and “principles.” Article 52(5) clarifies the judicial nature of these “principles.”<sup>58</sup> The wording of Article 52(5) of the Charter and the relevant explanations are confirmed by the genesis of this provision, and of Article 51(1) second sentence, which appears particularly significant.

Article 52(5) provides that principles “may be implemented” by the institutions, bodies, offices, and agencies of the European Union, as well as Member States when they implement EU law in the exercise of their respective powers, and that these principles “shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.”<sup>59</sup> The explanations related to Article 52 of the Charter refer to Article 51(1) and state that “subjective rights shall be respected, whereas principles shall be observed.”<sup>60</sup> Furthermore, the explanations refer to the jurisprudence of the Court<sup>61</sup> as well as the approach of the Member States’ constitutional systems that are relevant to “principles,” particularly in the field of social rights, and state that principles “do not however give rise to direct claims for positive action by the Union’s institutions or Member States authorities.”<sup>62</sup>

The distinction between “rights” and “principles”—mentioned in the preamble of the Charter and the second sentence of Article 51(1) (Article II-111(1) of the Constitutional project)—played an important role during the drafting of the Charter.<sup>63</sup> In this regard, the Convention was especially

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58. The Court has not yet adjudicated on the distinction between rights and principles.

59. Charter of Rights, *supra* note 6, art. 52(5), 2010 O.J. C 83, at 403.

60. Charter Explanations, *supra* note 17, at 35.

61. See *Pfizer Animal Health SA v. Council*, Case T-13/99, [2002] E.C.R. II-3305; *Van den Bergh en Jurgens BV & Van Dijk Food Products (Lopkik) BV v. Eur. Econ. Cmty.*, Case 265/85, [1987] E.C.R. 1169.

62. Charter Explanations, *supra* note 17, at 35.

63. See Clemens Ladenburger, *Artikel 52 GRCh (Art. II -112 VVE) Tragweite und Auslegung der Rechte und Grundsätze*, in *KÖLNER GEMEINSCHAFTSKOMMENTAR ZUR EUROPÄISCHEN GRUNDRECHTE-CHARTA*, *supra* note 7, at 774, 780, ¶ 6; see also Sacha Prechal, *Rights v. Principles, or How to Remove Fundamental Rights from the Jurisdiction of the Courts*, in *THE EUROPEAN UNION AN ONGOING PROCESS OF INTEGRATION* 177, 179 (Steven Blockmans et al. eds., 2004).



influenced by Spanish constitutional law, particularly Article 53(3) of the Spanish Constitution concerning the justiciability of the guiding principles of social and economic policy.<sup>64</sup> The Convention also was influenced by French constitutional law, which features a distinction between rights that are fully justiciable and “principles of constitutional value” that do not give the individual persons a right to commence an action and only permits the constitutional council to determine whether the legislature took measures that are contrary to such principles.<sup>65</sup> This distinction between “rights” and “principles” should reduce the divergence between constitutional traditions of Member States to a common denominator.<sup>66</sup> It served as a compromise during the intense and controversial discussions at the Convention regarding standards that contained subjective rights and those that only contained objective rights, particularly in relation to social rights whose justiciability had been challenged by certain members of the Convention.<sup>67</sup> The differences between the supported positions are explained by the different political sensibilities<sup>68</sup> and distinct constitutional traditions regarding the existence and scope of subjective and objective rights, in particular social rights.<sup>69</sup>

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64. Article 53(3) of the Spanish Constitution states: “El reconocimiento, el respeto y la protección de los principios reconocidos en el Capítulo tercero informarán la legislación positiva, la práctica judicial y la actuación de los poderes públicos. Sólo podrán ser alegados ante la Jurisdicción ordinaria de acuerdo con lo que dispongan las leyes que los desarrollen.” CONSTITUCIÓN ESPAÑOLA. B.O.E. N. 311, Dec. 29, 1978, art. 53 (Spain). An English translation is available at SPANISH CONSTITUTION art. 53, at 15, [http://www.senado.es/constitu\\_i/indices/consti\\_ing.pdf](http://www.senado.es/constitu_i/indices/consti_ing.pdf) (“Recognition, respect and protection of the principles recognized in Chapter 3 shall guide legislation, judicial practice and actions by public authorities. They may only be invoked before the ordinary courts in accordance with the legal provisions implementing them.”).

65. See BRAIBANT, *supra* note 7, at 46, 85; see also Ladenburger, *supra* note 63, at 780–81.

66. See Ladenburger, *supra* note 63, at 780–81, ¶¶ 7–10.

67. These discussions had resulted from the conclusions of the 1999 Cologne European Council, according to which the Charter was to contain economic and social rights and not norms that only constituted objective rights. See Benoît-Rohmer, *supra* note 9, at 1485; see also Borowsky, *supra* note 18, at 535–36, 543; Jacqué, *supra* note 9, at 5; Ladenburger, *supra* note 63, at 780–81, ¶ 7.

68. See BRAIBANT, *supra* note 7, at 74.

69. For example, there are constitutional concepts that distinguish between fully justiciable subjective rights and “programmatic rights,” which are entirely unjusticiable (see IR. CONST. 1937, art. 45) or justiciable to a limited extent (see CONSTITUCIÓN ESPAÑOLA, B.O.E. N. 311, Dec. 29, 1978, art. 53(3) (Spain)) even though these distinctions are made subjectively, whereas the fundamental law of Germany is based

Moreover, Article 52(5) did not appear in the initial version of the Charter that was presented at the Nice summit of December 2000 and was added during the Treaty negotiations establishing a European Constitution as proposed by the European Convention.<sup>70</sup> This addition allowed the United Kingdom to overcome its reluctance towards the insertion of the Charter in the constitutional project and concluded the deliberations regarding the development of the Charter.<sup>71</sup> It should confirm the distinction between rights and principles provided by the Charter in the preamble and Article 51(1), second sentence (Article II-111(1), of the constitutional project) and clarify the judicial nature of the principles<sup>72</sup> while reinforcing legal certainty.<sup>73</sup>

The Charter does not characterize individual articles as being constitutive of rights, principles or both. In accordance with the intention of the Convention, such a characterization is incumbent upon future jurisprudence that shall also consider the directions found in the explanations.<sup>74</sup> Articles 25, 26, and 37 are listed as recognized principles under the Charter in explanations related to Article 52(5). In addition, the explanations also provide that the Charter may contain elements of both a right and a principle, for example, Articles 23, 33, and 34.<sup>75</sup> Moreover, Articles 35, 36, and 38 can also be characterized as principles based on their respective wording and relevant explanations.<sup>76</sup>

The characterization of the articles of the Charter as either principles, rights, or both is not an easy task. One is particularly faced with the question as to what standards of analysis should

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on a narrow understanding of rights, limited to justiciable individual rights. See Ladenburger, *supra* note 63, at 780–81, ¶ 7; see also *id.* at 765 nn.40–43.

70. Ladenburger, *supra* note 63, at 780, ¶ 6.

71. See *id.* at 781–81, ¶ 7.

72. See Borowsky, *supra* note 18, at 573; see also TRIDIMAS, *supra* note 36, at 367.

73. See EUROPEAN CONVENTION WORKING GRP. II, CONV 354/02, INCORPORATION OF THE CHARTER/ACCESSION TO THE ECHR: FINAL REPORT 8 (2002).

74. See *id.*; see also EU NETWORK OF INDEP. EXPERTS ON FUNDAMENTAL RIGHTS, *supra* note 35, at 407–08.

75. Explanations relevant to this Essay reveal that Paragraphs 1 and 3 should be considered principles.

76. See Koen Lenaerts, *La Solidarité ou le Chapitre IV de la Charte des Droits Fondamentaux de l'Union Européenne*, 82 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 217, 225–26 (2010).

be applied to such a characterization. Given the wording of Article 52(5), the relevant explanations, and the origin of the distinction between “rights” and “principles” in the Charter, it seems clear that they do not confer a subjective right that can be invoked by individuals,<sup>77</sup> an observation that serves as the point of departure for any analysis. In this regard, the explanations can offer useful suggestions, at least in some cases. Additionally, at the time of the Convention deliberations, it was emphasized that the wording of the Charter provisions should provide important suggestions for criteria under which to analyze whether something is a right or a principle.<sup>78</sup> The same applies to the genesis of the articles and their respective goals. A certain degree of precision in applying an article is essential, as is the need for codification of its content by the legislature.<sup>79</sup>

Regarding the legal effects and their implications for judicial review of a violation of rights or principles, the fact that the provisions mentioned above do not confer subjective rights that can be invoked by individuals implies that they only have limited justiciability.<sup>80</sup> Certainly, the views regarding the extent of the distinction between full justiciability of fundamental rights and a limited justiciability of principles are divergent. Nonetheless, it would mean that principles should be taken into account at the time of the review of the legality of secondary legislation as well as at the time of the interpretation of secondary legislation and Member State legislation that is implementing EU law.<sup>81</sup> However, the principles neither include rights for their implementation by the legislatures of the European Union or Member States, and thus positive benefits, nor do they confer standing to take legal action. Furthermore, the right to an effective remedy, as provided for under Article 47

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77. See Jacqu , *supra* note 11, at 115; *see also* EU NETWORK OF INDEP. EXPERTS ON FUNDAMENTAL RIGHTS, *supra* note 35, at 407; Lenaerts, *supra* note 76, at 224; Prechal, *supra* note 63, at 179.

78. See Ladenburger, *supra* note 63, at 806–07, ¶ 98.

79. See Jacqu , *supra* note 11, at 114; *see also* Ladenburger, *supra* note 63, at 806–07, ¶ 98.

80. See Jacqu , *supra* note 11, at 115; *see also* EU NETWORK OF INDEP. EXPERTS ON FUNDAMENTAL RIGHTS, *supra* note 35, at 407; Lenaerts, *supra* note 76, at 224.

81. In this context, the question is whether certain measures should be designed to implement the invoked principle. *See* Prechal, *supra* note 63, at 179; *see also* EU NETWORK OF INDEP. EXPERTS ON FUNDAMENTAL RIGHTS, *supra* note 35, at 407.

of the Charter, does not result in, or serve as the basis for, a claim for damages based on the noncontractual liability of the European Union under Article 340(2) of the TFEU, or the noncontractual liability of Member States for a violation of a principle.<sup>82</sup>

It can be argued that the Court will grant to the legislature of the European Union, as well as to the national legislatures, within the limits set by EU law, a large margin of appreciation with regard to the implementation of a principle, so that the extent of judicial review might, in the end, be limited to manifest errors of law.

#### IV. *THE LIMITATION OF FUNDAMENTAL RIGHTS*

Contrary to the ECHR, which enumerates specific limitations in each article, Article 52(1) of the Charter includes a general limitations clause which cumulatively refers to the legality of limitations on the exercise of rights and freedoms recognized by the Charter.<sup>83</sup> There are certain conditions on the general limitation found in the Charter;<sup>84</sup> a limitation of those rights and freedoms<sup>85</sup> must respect their substance as well as the principle of proportionality and, in this context, pursue particular objectives. This general limitations clause also applies to rights and freedoms that are defined in Article 52(3).<sup>86</sup> As a result, the rights that correspond to the ECHR are subject to the

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82. See Ladenburger, *supra* note 63, at 804, ¶ 86; see also Lenaerts, *supra* note 76, at 224.

83. In principle, this clause should not be applied to principles given their legal nature as well as the wording of Article 52(1), which only refers to rights.

84. See Opinion of Advocate General Cruz Villalón, *Scarlet Extended SA v. Société Belge des Auteurs Compositeurs et Éditeurs*, Case C-70/10, [2011] E.C.R. I\_\_\_\_, ¶¶ 93–113 (delivered Apr. 14, 2011) (not yet reported).

85. See *Commission v. Germany*, Case C-271/08, [2010] E.C.R. I-7091, ¶ 47; see also *Deutsche Telekom AG v. Germany*, Case C-543/09, [2011] E.C.R. I\_\_\_\_, ¶ 66 (delivered May 5, 2011) (not yet reported); *J.McB. v. I.E.*, Case C-400/10, [2010] E.C.R. I\_\_\_\_, ¶ 57 (delivered Oct. 5, 2010) (not yet reported).

86. See *J.McB.*, [2010] E.C.R. I\_\_\_\_, ¶¶ 53, 59, where the application of Article 52(1), regarding a right recognized by the Charter corresponds to a right provided for by the European Convention on Human Rights (“ECHR”). Certain authors propose that it does not apply to rights that are found in the treaties as well as rights that correspond to the ECHR. See, e.g., STEFAN BARRIGA, *DIE ENTSTEHUNG DER CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION: EINE ANALYSE DER ARBEITEN IM KONVENT UND KOMPETENZRECHTLICHER FRAGEN* 157 (2003); RENGELING & SZCZEKALLA, *supra* note 35, at 255, 260, ¶¶ 463, 473; Borowsky, *supra* note 18, at 556.

limitations set by the ECHR.<sup>87</sup> However, the ECHR does not apply to rights derived from the Treaties, which are only subject to the conditions and limitations defined by those Treaties (Article 52(2) of the Charter). The Court has not yet adjudicated any matter regarding the interpretation of the general limitations clause in Article 52(1). However, as it emanates from the explanations, this clause is influenced by the jurisprudence of the Court on fundamental rights according to which “restrictions may be imposed on the exercise of those rights...provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights.”<sup>88</sup>

In view of the fact that the general limitations clause is a unique creation of the Charter, it should be interpreted in an autonomous manner, taking into consideration the jurisprudence of the Court related to the review of the principle of proportionality in the context of fundamental rights.<sup>89</sup> In this context, the principle of proportionality requires an

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87. See the relevant explanations to Article 52 according to which paragraph three of this Essay intends to ensure the necessary consistency between the Charter and the ECHR, insofar as the rights included in the Charter correspond to those guaranteed by the ECHR, meaning that these rights should be applied in accordance with the limitations defined in the ECHR, unless it impedes upon the autonomy of EU law and the Court. However, in accordance with Article 53 of the Charter, if the clause of limitations in paragraph one applies to the rights recognized by the ECHR, such an application cannot lead to an inferior degree of protection than the one found in the ECHR. In reality, a tension could result from the fact that the conditions that must be met under the review of principle of proportionality under the ECHR, which is closely linked to the specific limitations on the exercise of a particular right, and the requirements of Article 52(1) of the Charter are different. In principle, an eventual conflict resulting from such different conditions should be resolved by an application leading to a much increased degree of protection of the fundamental right in question. See Thomas von Danwitz, *Artikel 53 GRCh (Art. II-113 VVE) Schutzniveau*, in *KÖLNER GEMEINSCHAFTSKOMMENTAR ZUR EUROPÄISCHEN GRUNDRECHTE-CHARTA*, *supra* note 7, at 815, 819, 821, ¶¶ 12, 19.

88. *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, Case 5/88, [1989] E.C.R. 2609, ¶ 18; see *Karlsson*, Case C-292/97, [2000] E.C.R. I-2737, ¶ 45.

89. Clearly, the jurisprudence of the European Court of Human Rights should be taken into consideration when a question deals with rights recognized by the Charter that also correspond to the rights guaranteed by the ECHR. In accordance with Article 52(1), the meaning and the scope of the rights are the same as those conferred by the ECHR, unless the degree of protection offered by the Charter is broader.

examination of a measure's ability to achieve a pursued objective and its necessity, as well as its appropriateness.<sup>90</sup> The latter entails an evaluation determining whether the disadvantages resulting from the measure in question are not disproportionate to the aims pursued,<sup>91</sup> and examining whether the means applied by that measure to achieve its aim correspond to its importance.<sup>92</sup> Thus, this determination involves a cost-benefit analysis of the measures in question, and particularly an evaluation of the importance attributed to the protected fundamental right that has been limited.<sup>93</sup>

In the context of the examination of the principle of proportionality, one must determine what kind of objectives may be pursued by a measure limiting a right recognized by the Charter. According to Article 52(1) of the Charter, limitations may be made "to protect the rights and freedoms of others"<sup>94</sup> as well as based on "objectives of general interest recognised by the Union." This last notion includes, among others, public order, public security, and public health<sup>95</sup> The Court accepts that different levels and systems of protection among Member States exist,<sup>96</sup> which may influence the balancing of these interests.<sup>97</sup>

90. See *Queen v. Sec'y of State for Health, ex parte British Am. Tobacco (Invs.) Ltd.*, Case C-491/01, [2002] E.C.R. I-11,453, ¶¶ 149–53.

91. See the traditional jurisprudence of the Court regarding the principle of proportionality: *Afton Chem. Ltd. v. Sec'y of State for Transp.*, Case C-343/09, [2010] E.C.R. I-7023, ¶ 45; *Müller Fleisch GmbH v. Land Baden-Württemberg*, Case C-562/08, [2010] E.C.R. I-1391, ¶ 43; and *Hermann Schröder HS Kraftfutter GmbH & Co. KG, Ochtrup v. Hauptzollamt Gronau*, Case 265/87, [1989] E.C.R. 2263, ¶ 15.

92. See the traditional jurisprudence of the Court regarding the principle of proportionality: *Otto Pressler Weingut-Weingrosskellerei GmbH & Co. KG v. Germany*, Case C-319/90, [1992] E.C.R. I-203, ¶ 12; *Firma Otto Lingenfelder v. Germany*, Case C-118/89, [1990] E.C.R. I-2637, ¶ 12; *Denkavit France SARL v. Fonds d'Orientation et de Régularisation des Marchés Agricoles (FORMA)*, Case 266/84, [1986] E.C.R. 149, ¶ 17; *Fromançais SA v. Fonds d'Orientation et de Régularisation des Marchés Agricoles (FORMA)*, Case 66/82, [1983] E.C.R. I-395, ¶ 8.

93. See *Sec'y of State for Health, ex parte British Am. Tobacco (Invs.) Ltd.*, [2002] E.C.R. I-11,453, ¶¶ 149–53.

94. In this regard, the Charter is inspired by Article 31 of the European Social Charter. See *European Social Charter art. 31*, Oct. 18, 1961, 529 U.N.T.S. 89, 120.

95. See the explanations that state that the general interest recognized by the Union covers the objectives mentioned in Article 3 of the Treaty on European Union ("TEU") and other interests protected by specific provisions of the treaties, such as Article 4(1) of the TEU and Articles 35(3), 36, and 346 of the Treaty on the Functioning of the European Union. *Charter Explanations*, *supra* note 17, at 32.

96. According to the following case law, Member States remain free to determine, in accordance with their national needs, requirements of the public order. See *Comm'n*

The Court also has recognized, on the basis of a provision of secondary legislation, that Member States have the authority to establish a balance among the different fundamental rights that the European Union aims to guarantee under the Charter.<sup>98</sup> Consequently, requirements of national law may prove to be pertinent at the time of the interpretation of the general limitations clause.

*V. MULTIPLICATION OF SOURCES OF FUNDAMENTAL RIGHTS: WHAT IS THE RELATIONSHIP AMONG THE CHARTER, GENERAL PRINCIPLES, COMMON CONSTITUTIONAL TRADITIONS, AND CONVENTIONAL RIGHTS?*

A principal concern for the daily application of fundamental rights by national courts and the ECJ is the multiplication of sources of fundamental rights that is apparent from an initial reading of the Charter. Related to the problem of multiplication of sources is the question of consistency of fundamental rights protection for the individual.

*A. Fundamental Rights Protection in a System of Multilevel Governance*

Clearly, there is a general issue related to the three levels of fundamental rights protection in Europe: national legal systems, which sometimes have a two-stage protection system offered by federated entities and federal states; the legal order of the European Union; and the subsidiary system of the ECHR. Ensuring a certain level of consistency in the degree of fundamental rights protection among these different systems is

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of the Eur. Cmty. v. Italy, Case C-326/07, [2009] E.C.R. I-2291, ¶ 70; Comm'n of the Eur. Cmty. v. Luxembourg, Case C-319/06, [2008] E.C.R. I-4323, ¶ 50; Ministerul Administrației și Internelor—Direcția Generală de Pașapoarte București v. Jipa, Case C-33/07, [2008] E.C.R. I-5157, ¶ 23; Assoc. Église de Scientologie de Paris v. Prime Minister, Case C-54/99, [2000] E.C.R. I-1335, ¶ 17; Rutili v. Ministre de l'Intérieur, Case 36/75, [1975] E.C.R. 1219, ¶¶ 26–28; *see also* Sayn-Wittgenstein v. von Wien, Case C-208/09, [2010] E.C.R. I\_\_\_\_, ¶ 87 (delivered Dec. 22, 2010) (not yet reported); Omega Spielhallen-und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, Case C-36/02, [2004] E.C.R. I-9609, ¶¶ 37, 38.

97. *See Sayn-Wittgenstein*, [2010] E.C.R. I\_\_\_\_; *Omega*, [2004] E.C.R. I-9609, ¶ 38.

98. *See Productores de Música de España (Promusicae) v. Telefónica de España SAU*, Case C-275/06, [2008] E.C.R. I-271, ¶ 68.

crucially important to the acceptance of a strong European fundamental rights jurisprudence by the national judiciaries. In general terms, it would certainly be detrimental to the functioning of fundamental rights protection in Europe if the different courts involved in the process entered into a competition for “who grants the best fundamental rights protection.” Furthermore, a maximum level of protection for the exercise of one fundamental right usually occurs at the cost of another. A race to the top for one fundamental right would inevitably lead to a race to the bottom for another. In addition to this problem of trying to attain the “right” level of fundamental rights protection, such a judicial competition would inevitably lead to an institutional quest for leadership in fundamental rights protection. That kind of evolution would not only incentivize detrimental forum shopping for fundamental rights protection in Europe, but, most importantly, it would neglect the fundamental necessity for the preservation of traditional differences in fundamental rights protection that result from national traditions, cultural specificities, and historical evolution leading to a specific conditioning of the legal culture of one or more Member States. There are plenty of examples in that respect: the concept of human dignity,<sup>99</sup> the so-called armed democracy in the basic law of Germany,<sup>100</sup> the laws on nobility in Austria,<sup>101</sup> the status of the Catholic Church under the constitution of Poland,<sup>102</sup> and the particular importance attributed to the principle of *laïcité* by the French constitution.<sup>103</sup> In such circumstances, the “required” protection of fundamental rights is deeply linked to a respect for the constitutional identity of Member States as required by Article

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99. See *Omega*, [2004] E.C.R. I-9609, ¶¶ 34–38.

100. See *Mesopotamia Broadcast A/S METV & Roj TV A/S v. Bundesrepublik Deutschland*, Joined Cases C-244–245/10, [2011] E.C.R. I\_\_\_\_, ¶¶ 50–51 (delivered Sept. 22, 2011) (not yet reported).

101. See *Sayn-Wittgenstein*, [2010] E.C.R. I\_\_\_\_, ¶ 88.

102. See KONSTITUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION] Apr. 2, 1997, *DZIENNIK USTAW REPUBLIKI POLSKIEJ* [GOVERNMENT REGULATIONS AND LAWS GAZETTE OF THE REPUBLIC OF POLAND] No. 78, Item 483, art. 25(4), *in connection with the SOLLEMNIS CONVENTIO: INTER APOSTOLICAM SEDEM ET POLONIAE REM PUBLICAM* [Concordat Between the Holy See and the Republic of Poland], July 28, 1993, XC A.A.S., no. 2, 1998, at 310.

103. See 1958 CONST. art. 1 (Fr.).



4(2) of the Treaty on European Union (“TEU”)<sup>104</sup> and as the requirement for subsidiarity of fundamental rights is understood. In essence, the respect for a certain level of consistency in the jurisprudence on fundamental rights of different courts in Europe is as important as the respect for a certain degree of diversity in fundamental rights protection resulting from the major differences in the constitutional traditions of Member States.

*B. In Search of a Consistent Approach in Union Law*

There is another basic question in daily jurisprudential practice that is related to the consistency of fundamental rights protection in the jurisprudence of the ECJ. It results from the multiplication of legal sources of fundamental rights that are respected by the EU legal order itself. The wording of Article 6 of the TEU<sup>105</sup> does not prevent EU law from providing more extensive protection. From a more general point of view, Article 53 of the Charter states that nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized by EU law, international law, international agreements to which the European Union or all Member States are party, including the ECHR, and the constitutions of Member States.<sup>106</sup> Article 52(4) and (6) elaborate further that the Charter rights shall be interpreted in harmony with constitutional traditions common to the Member States and, furthermore, that full account shall be taken of national laws and practices as specified in the Charter.<sup>107</sup> However, the essential question remains unanswered by these provisions: how the ECJ will cope with the challenge of interpreting potentially conflicting provisions found in the ECHR, other international agreements, and national constitutions, if conciliation cannot be achieved. It seems that these Charter provisions are focused on the realization of a

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104. See Consolidated Version of the Treaty on European Union art. 4, 2010 O.J. C 83/01, at 18 [hereinafter TEU post-Lisbon].

105. See *id.* art. 6, at 19.

106. See Charter of Rights, *supra* note 6, art. 53, 2010 O.J. C 83, at 403.

107. See *id.* arts. 52(4), 52(6), at 44.

maximum standard of one fundamental right,<sup>108</sup> but neglect the state of conflicting fundamental rights of different parties in multipolar relations. The rules contained in the Charter are of no real assistance in those circumstances, but nonetheless they allow for one to conclude that the ECJ should exercise its mandate in a twofold orientation; the level of fundamental rights protection provided by the ECHR international law, international agreements, or national constitutions shall not be restricted. Moreover, the balancing of conflicting interests should be conducted in a manner that allows for the optimization of fundamental rights protection.<sup>109</sup> It goes without saying that the openness of the Charter provisions in this respect leaves room for a genuine debate between the national courts and the ECJ within the framework of judicial cooperation via the preliminary reference proceeding under Article 267 of the TFEU.

#### VI. PROCEDURAL QUESTIONS RELATING TO THE APPLICATION OF THE CHARTER

In judicial practice, the significance of the Charter depends to a large extent on the way in which national courts will proceed with the Charter's application. Preliminary rulings since December 2009 have shown that, in general, national courts do not show any reluctance to apply the Charter rights and are willing to explore the scope and meaning of its provisions by making use of the preliminary proceeding.<sup>110</sup> It might therefore

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108. See generally Leonard F.M. Besselink, *Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union*, 35 COMMON MKT. L. REV. 629 (1998).

109. See von Danwitz, *supra* note 87, at 821, ¶¶ 19–21.

110. See, e.g., *Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, Case C-69/10, [2011] E.C.R. I \_\_\_\_ (delivered July 28, 2011) (not yet reported); *Ass'n Belge des Consommateurs Test-Achats ASBL v. Conseil des Ministres*, Case C-236/09, [2011] E.C.R. I \_\_\_\_ (delivered Mar. 1, 2011) (not yet reported); *Aguirre Zarraga v. Pelz*, C-491/10, [2010] E.C.R. I \_\_\_\_ (delivered Dec. 22, 2010) (not yet reported); *Asparuhov Estov v. Ministerski savet na Republika Bulgaria*, Case C-339/10, [2010] E.C.R. I \_\_\_\_ (delivered Nov. 12, 2010) (not yet reported); *J.McB. v. L.E.*, Case C-400/10, [2010] E.C.R. I \_\_\_\_, ¶¶ 32–34, 51–52 (delivered Oct. 5, 2010) (not yet reported); *Opinion of Advocate General Sharpston, Shecke & Eifert v. Land Hessen*, Joined Cases C-92–93/09, [2010] E.C.R. I \_\_\_\_, ¶¶ 56–58 (delivered June 17, 2010) (not yet reported); see also *Dominguez v. Centre Informatique du Centre Ouest Atlantique*, Case C-282/10, [2012] E.C.R. I \_\_\_\_, ¶¶ 12–14 (delivered Jan. 24, 2012).

be quite useful to highlight some major procedural questions relating to the application of the Charter.

*A. Procedural Foundations of the Judicial Review of the Charter*

One should first note that the Charter does not contain any specific rules on the procedural treatment of questions relating to the Charter as compared with those relating to EU law in general. Notably, there is no explicit requirement that national judges review the validity or lawfulness of an act in relation to the Charter rights *ex officio*. Therefore, it appears reasonable to apply the jurisprudence of the ECJ regarding the requirement for *ex officio* review of EU law, in general, to the rights granted by the Charter.<sup>111</sup> Accordingly, EU law does not require national jurisdictions to exercise an *ex officio* review of a violation of EU law. Yet, if national jurisdictions are under the obligation of national law to exercise such a review *ex officio*, or have the ability to do so, they are obliged to proceed accordingly with respect to a binding provision of EU law.<sup>112</sup>

As a matter of principle, the effectiveness of the fundamental rights guaranteed by the Charter requires that national judges give direct effect to the provisions of the Charter,<sup>113</sup> irrespective of whether the Charter provision contains a right or a principle. Accordingly, national judges have to exercise an exhaustive review in that respect. As for the consequences of this review, it has to be noted that general rules of EU law apply in this respect as well. The principle of primacy requires that national law be interpreted in accordance with a fundamental right granted by the Charter and as interpreted by

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(not yet reported); Opinion of Advocate General Trstenjak, *M.E. v. Refugee Applications Comm'r*, Case C-493/10, [2010] E.C.R. I\_\_\_\_, ¶ 38 (delivered Sept. 22, 2011) (not yet reported); Opinion of Advocate General Trstenjak, *N.S. v. Sec'y of State for the Home Dep't*, Case C-411/10, [2010] E.C.R. I\_\_\_\_, ¶¶ 1, 4–5, 51–53 (delivered Sept. 22, 2011) (not yet reported); Reference for a Preliminary Ruling, *ZZ v. Sec'y of State for the Home Dep't*, Case C-300/11 (June 11, 2011).

111. See, e.g., *Marín Marín v. EDP Editorcs SL*, Case C-227/08, [2009] E.C.R. I-11939, ¶¶ 19–20; *Willy Kempter KG v. Hauptzollamt Hamburg-Jonas*, Case C-2/06, [2008] E.C.R. I-411, ¶ 45; *J. Van der Weerd v. Minister van Landbouw, Natuur en Voedselkwaliteit*, Joined Cases C-222–25/05, [2007] E.C.R. I-4249, ¶ 36.

112. See *Willy Kempter*, [2008] E.C.R. I-411, ¶ 45.

113. See *Ladenburger*, *supra* note 7, at 762, ¶ 10.

the Court in order to attain the result envisioned by EU law.<sup>114</sup> If an interpretation in conformity with Union law requirements is not feasible, national judges are under the obligation to apply the law of the European Union in its entirety, and to protect the rights conferred upon individuals by EU law by refusing to apply any provision of the conflicting national law.<sup>115</sup>

### *B. Methods of Interpretation*

According to Article 6(1) of the TEU and Article 52(7) of the Charter, the explanations have to be taken into consideration for the interpretation of the Charter.<sup>116</sup> So far, the Court has made an explicit reference to these provisions in only one case.<sup>117</sup> Beyond their practical value, the explanations raise the questions of whether and, eventually, to what extent, the interpretation of the Charter rights requires a specific methodology.

The particular importance attributed to the explanations by the treaty and the Charter, however, does not provide a convincing reason to derogate from the traditional methods of interpretation.<sup>118</sup> In particular, the interpretation based on the wording of a provision, which constitutes the method of interpretation most frequently used by the Court,<sup>119</sup> and, according to its teleology, will continue to be used. Nonetheless, the particular importance accorded to the genesis of the Charter and its different provisions as evidenced by the obligation to take the explanations of the Charter into account will be relevant for the way in which different methods of

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114. See, e.g., *Criminal Proceedings Against X*, Case C-60/02, [2004] E.C.R. I-665, ¶ 59; *Murphy v. Bord Telecom Eircann*, Case 157/86, [1988] E.C.R. 686, ¶ 11.

115. See, e.g., *Land Oberösterreich v. ĆEZ as*, Case C-115/08, [2009] E.C.R. I-10265, ¶ 140; *Frigerio Luigi & C. Snc v. Comune di Triuggio*, Case C-357/06, [2007] E.C.R. I-12311, ¶ 28; *ITC Innovative Tech. Ctr. GmbH v. Bundesagentur für Arbeit*, Case C-208/05, [2007] E.C.R. I-181, ¶ 69.

116. TEU post-Lisbon, *supra* note 104, art. 6(1), 2010 O.J. C 83, at 19; Charter of Rights, *supra* note 6, art. 52(7), 2010 O.J. C 83, at 403.

117. See *DEB Deutsche Energiehandels-und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, Case C-279/09, [2010] E.C.R. I\_\_\_\_, ¶¶ 32, 35–36, 39 (delivered on Dec. 22, 2010) (not yet reported).

118. Those methods are interpretation particularly according to the wording, the system, the origins, and the teleology of a standard.

119. See Mariele Dederichs, *Die Methodik des Gerichtshofes der Europäischen Gemeinschaften*, 39 *EUROPARECHT* 345, 349 (2004).

interpretation might be used and even how they might be interrelated. Of course, the obligation to take the explanations into account under Article 6(1) of the TEU and Article 52(7) of the Charter does not go beyond a procedural necessity and does not oblige the Court to follow the reasoning provided in the explanation, or even to adopt a specific interpretation. In our view, it would not be justified to adopt a formally binding ranking system for different methods of interpretation or even to generally give priority to an interpretation according to genesis. It would certainly run counter to the explicit reference to take into account the explanations and the genesis, if an interpretation left out these elements and did not give convincing reasons for a different method of interpretation. Finally, it should be noted that Article 52(4) and (6) of the Charter require, under given circumstances, an interpretation that takes into account common constitutional traditions of the Member States and national laws and practices.<sup>120</sup> In essence, the explicit reference to the explanations and thereby to the genesis of the Charter should be understood as a general reminder to interpret the provisions of the Charter only on the basis of a sound methodology.

### *C. Horizontal Direct Effect*

Finally, the question of whether the fundamental rights of the Charter convey a horizontal direct effect should be addressed, though it has not yet been answered by the Court.<sup>121</sup> Given the far-reaching provisions in Chapter IV of the Charter on “solidarity,” the recognition of a horizontal direct effect would undoubtedly have significant consequences both for legal traditions of some Member States, which have so far been rather

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120. Even before the Charter came into force, the Court's jurisprudence on fundamental rights had been influenced by constitutional traditions common to all Member States, as well as guidelines found in international instruments concerning the protection of human rights that the Member States cooperated in or adhered to. *See* *Ordre des Barreaux Francophones et Germanophones v. Conseil des Ministres*, Case C-305/05, [2007] ECR I-5305, ¶ 29; *see also* *Kadi v. Council & Commission*, Joined Cases C-402/05 P & C-415/05 P, [2008] E.C.R. I-6351, ¶ 283.

121. *Cf.* *Kücükdeveci v. Swedex GmbH & Co. KG*, Case C-555/07, [2010] E.C.R. I-365; *Mangold v. Helm*, Case C-144/04, [2005] E.C.R. I-9981, ¶ 77. Both cases acknowledged a horizontal direct effect to the general principle of nondiscrimination, substantiated by Directive 2000/78.

reluctant to recognize the horizontal direct effects of fundamental rights,<sup>122</sup> and for the social partners involved. In addition, a direct horizontal effect of the fundamental freedoms under the Treaty has only been recognized in exceptional circumstances.<sup>123</sup> The same applies to general principles of EU law<sup>124</sup> and the directives.<sup>125</sup> At a first glance, it would therefore seem plausible to argue that the recognition of a horizontal direct effect of the Charter would have necessitated an explicit provision, at least under the provisions on “solidarity.” In particular, the cautious distinction between rights and principles would seem much less conclusive under the conditions of

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122. This is, in principle, the case in Austrian, German, and Spanish law. See as for German law, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 15, 1958, 7 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 198 (205); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 14, 1973, 34 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 269 (271); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 25, 1979, 52 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 131 (173); Hans-Jürgen Papier, *Drittwirkung der Grundrechte*, in 2 HANDBUCH DER GRUNDRECHTE IN DEUTSCHLAND UND EUROPA § 55, at 1331 (Detlef Merten & Hans-Jürgen Papier eds., 2006). See as for Austrian law, Gabriele Kucsko-Stadlmayer, *Die Allgemeine Strukturen der Grundrechte*, in HANDBUCH DER GRUNDRECHTE IN DEUTSCHLAND UND EUROPA § 187, at 49, ¶¶ 44–45, 70–71 (Detlef Merten & Hans-Jürgen Papier eds., 2009), whereby the Austrian Constitution comprises certain fundamental rights that explicitly provide for a horizontal direct effect. See as for Spanish Law, Josep Ferrer i Riba & Pablo Salvador Coderch, *Vereinigungen, Demokratie und Drittwirkung*, in ZUR DRITTWIRKUNG DER GRUNDRECHTE 65–135 (Pablo Salvador Coderch et al. eds., 1998). In that context, it also should be noted that certain Member States consider social rights to be nonjusticiable and therefore it can be concluded that in those Member States a horizontal direct effect is at least excluded as to social rights. See *supra* note 64 and accompanying text.

123. See *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet*, Case C-341/05, [2007] E.C.R. I-11,767, ¶ 98; *Union Royale Belge des Sociétés de Football Ass’n (ASBL) v. Bosman*, Case C-415/93, [1995] E.C.R. I-4921, ¶¶ 83–84; 124. See *Queen v. Ministry of Agric., Fisheries & Food, ex parte Bostock*, Case C-2/92, [1994] E.C.R. I-955, and *Otto BV v. Postbank NV*, Case C-60/92, [1993] E.C.R. I-5683, where the Court denied such an effect under the circumstances found in the case at hand. See also *Kücükdeveci*, [2010] E.C.R. I-365, where the Court allowed such an effect.

124. See *Queen v. Ministry of Agric., Fisheries & Food, ex parte Bostock*, Case C-2/92, [1994] E.C.R. I-955, and *Otto BV v. Postbank NV*, Case C-60/92, [1993] E.C.R. I-5683, where the Court denied such an effect under the circumstances found in the case at hand. See also *Kücükdeveci*, [2010] E.C.R. I-365, where the Court allowed such an effect.

125. See *Criminal Proceedings Against Silvio Berlusconi & Others*, Joined Cases C-387/02, C-391/02 & C-403/02, [2005] E.C.R. I-3565; *Criminal Proceedings Against Kolpinghuis Nijmegen BV*, Case 80/86, [1987] E.C.R. 3969, ¶¶ 10, 13; *Marshall v. Southampton & Sw. Hampshire Area Health Auth.*, Case 152/84, [1986] E.C.R. 723; *Pubblico Ministero v. Ratti*, Case 148/78, [1979] E.C.R. 1629.

horizontal direct effect. Finally, the limited scope of application of the Charter, which is triggered by the implementation of another act of EU law according to Article 51(1), would make it rather difficult for national legislatures to enact legislation in compliance with fundamental rights of the Charter<sup>126</sup> and, in particular, for private parties to assess the extent to which they would be under an obligation resulting from the horizontal direct effect of charter rights. Currently, it is far from possible to give a certain answer to this major question. To the contrary, it seems quite likely that the importance of the question will lead to a preliminary request to the Court, sooner rather than later.

### CONCLUSION

The case law of the Court on fundamental rights granted by the Charter has evolved significantly after the Charter's entry into force. Even though major questions of horizontal impact remain unanswered, some of them will come before the Court in due course. So far, the Court has not shown any reluctance to address major questions, if there was a necessity to answer them. It is likely that the Court will soon enter into a decisive phase with respect to fundamental rights, in which conceptual foundations will be laid. While the recent jurisprudence shows promising signs that the high level of protection envisaged by Article 53 of the Charter will indeed be realized in practice, it seems that the Court will have to answer the most crucial questions relating to the "federal" issues on the applicability of the Charter. It goes without saying that this might, after all, be decisive for the acceptance of the Court's jurisprudence in the long run.

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126. See Ladenburger, *supra* note 7, at 762, ¶¶ 112–14.